Supreme Court, U.S.
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Case #_____

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JOHN STANTON,
Petitioner

v

DISTRICT OF COLUMBIA
COURT OF APPEALS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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43 pp

QUESTION PRESENTED

1. May respondent District of Columbia (DC) Court of Appeals construe the DC Bar Rules of Professional Conduct to require, as a condition for the practice of DC law, belief in the propriety of advocacy for guilty pleas by counsel for the accused in criminal prosecutions?

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OPINIONS

This petition is for review of the 26 September 1996 judgment of respondent DC Court of Appeals in *In re Stanton*, 682 A2d 655 (DC 1996), made final by the 10 March 1997 no-rehearing order. Copies of respondent's majority and dissenting opinions and of respondent's order denying rehearing are reproduced and appended to this petition.

JURISDICTION

Petitioner invokes jurisdiction under US Code § 28-1257 for review of the judgment of the DC Court of Appeals denying reinstatement to the practice of DC law and for judgment declaring respondent's construction of the DC Bar disciplinary rules in violation of federal constitutional freedom of expression.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

"[There] shall [be] no law . . . abridging the freedom of speech," US Constitution, Amendment I.

SUPREME COURT OF THE UNITED STATES

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v

DC COURT OF APPEALS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DC COURT OF APPEALS

STATEMENT OF THE CASE

The case presents the question whether under the First Amendment respondent DC Court of Appeals may construe the DC Bar Rules of Professional Conduct to require belief in the propriety of advocacy for guilty pleas by counsel for the accused in criminal prosecutions as a condition for reinstatement to the practice of DC law. Petitioner believes and argues that respondent may not so

regulate expression and that respondent's construction of the bar disciplinary rules must be declared unconstitutional.

Petitioner is an attorney suspended by respondent DC Court of Appeals indefinitely from the practice of DC law for his "view of his role as a lawyer"[1] when assisting the accused as counsel for defense in criminal prosecutions.

Respondent DC Court of Appeals "make[s] such rules as it deems proper"[2] for the admission or reinstatement of attorneys to the practice of DC law. Respondent deems proper rulemaking to require counsel

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[1] *In re Stanton*, 470 A2d 272, 281 (DC 1983), *cert denied* 466 US 972, 104 SCt 2347 (1984). Petitioner "holds philosophical beliefs concerning the ideal role of the defense attorney which happen to differ from those of individual members of the profession," *Matter of Stanton*, 532 A2d 95, 102 (DC 1987), who operate the DC Bar disciplinary regime, particularly his "deeply-held beliefs that attorney-assisted guilty pleas are unconstitutional," *In re Stanton*, 682 A2d 655, 656 (DC 1996), Appendix at 2A, if the assistance includes advocacy unless the client "has given [the attorney] expressly, without any equivocation, a clear directive to initiate the plea," *Id* at 657, Appendix at 3, and to be "an advocate for the finding of his guilt," *Ibid* .

[2] DC Code §11-2501(a).

for the accused "[to] assume the role of advocate for a client who desire[s] to plead guilty"[3] or "who *may*, due to any number of circumstances, including an aversion to the risks of trial, want to plead guilty."[4] In this role counsel "articulate the guilty plea of a client in court . . . and . . . convince a judge of the voluntariness of a guilty plea of a client during a Rule 11(d) inquiry"[5] by "advocating in open court."[6]

Petitioner's "understanding of his ethical duty"[7] as

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[3]*Matter of Stanton*, 532 A2d at 97.

[4]*In re Stanton*, 682 A2d at 658, Appendix at 6A, (emphasis added).

[5]*In re Stanton*, 589 A2d 425, 426 (DC 1991), *cert denied* 502 US 1098, 112 SCt 1178 (1992). Although DC Superior Court Criminal Procedure Rule 11(d), like Rule 11 of the Federal Rules of Criminal Procedure, requires the trial court to determine the voluntariness of a guilty plea "by addressing the defendant personally in open court," respondent's rule of advocacy overrides Rule 11(d) by requiring counsel for the accused defendant to convince the court of the voluntariness of the defendant's guilty plea.

[6]*In re Stanton*, 589 A2d at 426.

[7]*In re Stanton*, 589 A2d at 426. Petitioner believes counsel's duty "is to make certain that the plea is entered voluntarily," *United States v Crook*, 607 F2d 670, 672 (CA5 1979). Respondent DC Court of Appeals says petitioner's philosophical beliefs about the importance of

"an attorney representing a criminal defendant"[8] pleading guilty differs from respondent's view of "the duties imposed by the canons of ethics on an attorney representing a criminal defendant."[9] Petitioner believes he should be "assured that the plea was voluntary either because the client . . . was able to announce his decision to plead guilty in open court by saying, 'Judge, I want to plead guilty' at the inception of the proceedings or because the client has given [counsel] expressly, without any equivocation, a clear directive to initiate the plea."[10]

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safeguards for voluntariness in guilty pleas "call[ ] into question the [reinstatement] factor concerning character," *In re Stanton*, 682 A2d at 658.

[8] *In re Stanton*, 589 A2d at 426.

[9] *In re Stanton*, 589 A2d at 426.

[10] *In re Stanton*, 682 A2d at 657. Under Rule 1.2(c) of the DC Bar Rules of Professional Conduct an attorney or lawyer "may limit the objectives of the representation if the client consents after consultation," and such limitations "may exclude objectives or means that the lawyer regards as repugnant or imprudent," as petitioner regards advocacy for guilty pleas. Petitioner's practice is to limit his roles to advisor and negotiator and to exclude the role of advocate in assisting the accused in pleading guilty, and his clients invariably consent to this practice and agree to speak for themselves to announce

Petitioner also believes and argues that respondent has no right and no authority to make a rule requiring advocacy for guilty pleas and that respondent's advocacy rule is wrong and harmful because it violates counsel's right to freedom of expression and violates the rights of the accused to voluntary self-incrimination and to the assistance of counsel's advocacy for defense, not for pleading guilty.

Petitioner's disciplinary problem began when he and attorney Stephen Bright, representing the same client in separate criminal prosecutions, "disagreed about the advisability of her accepting the government's plea offer,"[11] and petitioner "volunteered to the court that he had

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their decisions to accept plea offers. If they do not speak up in this way or if they do not tell him otherwise, petitioner assumes they want assistance in defending themselves in reaching dispositions by "trial or dismissal," *In re Stanton*, 682 A2d at 656, Appendix at 2A, and he advocates accordingly. Respondent's rule of advocacy, however, overrides Rule 1.2(c) by requiring counsel, not the accused, to announce the decision and to articulate the guilty plea.

[11] *In re Stanton*, 470 A2d at 283.

advised [the client] that the plea agreement was improvident and unwise."[12] Mr Bright complained to DC Bar Counsel, who admonished petitioner that,

> We find that the decision of whether or not to go to trial must be balanced between the lawful objectives and desires of and benefits to one's client and the personal philosophies of the attorney.[13]

When petitioner rejected the admonition as an incorrect statement of the law, DC Bar Counsel prosecuted formal proceedings alleging violations of disciplinary rules vaguely and overbroadly construed.

In addition to the disagreement with Mr Bright, an incident in another criminal prosecution, where "the prosecutor offered to drop one of the two charges . . . if [the defendant] would enter a guilty plea to the other,"[14]

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[12] *In re Stanton*, 470 A2d at 284. Respondent characterizes this conduct as an "attempt in open court to thwart his clients' attempts to reach dispositions short of trial or dismissal," *In re Stanton*, 682 A2d at 656, Appendix at 2A.

[13] Letter of admonition, DC Bar Counsel to petitioner.

[14] *In re Stanton*, 470 A2d at 274.

also became part of petitioner's disciplinary problem. "After the jury had been impanelled, [the defendant] sought to enter a plea of guilty"[15] but became "confused as to why his drug charge and his petty larceny case had not been consolidated"[16] according to the prosecutor's offer, after the judge, vexed over the timing of the plea, ordered the offer withdrawn. "The judge declined to accept [the] plea on account of [the defendant's] apparent confusion, and the case went to trial."[17] Respondent found that petitioner "refused in open court to take any affirmative action to further his client's desires in the matter"[18] because he "said nothing to the court in aid of [the defendant's] attempted plea"[19] to convince the judge to

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[15] *In re Stanton*, 470 A2d at 274.

[16] *In re Stanton*, 470 A2d at 276.

[17] *In re Stanton*, 470 A2d at 274.

[18] *In re Stanton*, 589 A2d at 426, *In re Stanton*, 470 A2d at 276.

[19] *In re Stanton*, 470 A2d at 274.

accept it without dropping the other charge.

At the outcome of the disciplinary proceedings respondent suspended petitioner from practice for "*ex post facto*"[20] violations of the disciplinary rules.

In petitioner's first reinstatement proceedings, he told respondent "he would not in the future interfere with his client's plea,"[21] but he would not agree to be an advocate for guilty pleas, and respondent "made clear . . .

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[20]*In re Stanton*, 682 A2d at 657, Appendix at 3A. In respondent's DC Bar disciplinary proceedings, petitioner moved to dismiss the allegations against him as vague or overbroad, raising the due process defense of fair notice, but respondent's procedure "deferred ruling on his motion to dismiss the allegations," *Ibid.*, and respondent never ruled on the motion and never ruled on the claim that the procedure "denied him the opportunity to argue the unconstitutionality of the disciplinary rules," *Ibid.* Respondent's majority opinion says petitioner "failed to raise the first claim," *Ibid*, that is, "the unconstitutionality of the disciplinary rules as they were being applied to him, *Ibid*, "although he was not precluded from doing so," *Ibid.* In fact, the plain truth is that petitioner's motion to dismiss raised the first claim, and respondent's procedure that deferred ruling on the motion and precluded argument on it. The majority opinion cites a nonexistent footnote ("note 2, 470 A2d at 284," *Ibid*) to indicate where respondent "resolved," *Ibid*, petitioner's claim against the unconstitutional procedure.

[21]Matter of Stanton, 532 A2d at 99. In other words, petitioner pledged to refrain from informing judges of advice to defendants not to accept plea offers.

that petitioner was being denied reinstatement because he still would not assume the role of an advocate for a client who desired to plead guilty."[22]

In the second reinstatement proceedings respondent ruled that petitioner's position that he is willing "to advise his clients who wished to plead guilty, to participate in plea negotiations with the prosecutor, and to insure that any plea offer was clearly set forth on the record"[23] was "insufficient"[24] to meet respondent's reinstatement criteria, ignoring and disregarding petitioner's constitutional freedom of expression claim against respondent's rule of advocacy for guilty pleas.

In the third reinstatement proceedings, petitioner again raised and respondent again ignored and disregarded the constitutional freedom of expression claim against the

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[22] *In re Stanton*, 589 A2d at 426.

[23] *In re Stanton*, 589 A2d at 426.

[24] *In re Stanton*, 589 A2d at 426.

advocacy rule, but petitioner pledged this time "to advocate for acceptance of his client's guilty plea if that is the course his client freely and intelligently chooses,"[25] amending his previous position that he "would not advocate on behalf of a client's guilty plea in any situation."[26]

Misrepresenting petitioner's testimony that he believes no client ever will choose to have him advocate for the client's guilty plea, respondent's majority opinion says

> [Petitioner] also stated that no client would ever, with proper regard to his interests, choose freely and intelligently to plead guilty to any charged offense.[27]

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[25] *In re Stanton*, 682 A2d at 657, 658, Appendix at 4A, 6A. Petitioner told respondent that he believes no client "will ever 'freely and intelligently' request his assistance in pleading guilty," *Id* at 658, by "being an advocate for the finding of [the client's] guilt," *Id* at 657.

[26] *In re Stanton*, 682 A2d at 656, Appendix at 2A. Respondent DC Court of Appeals misrepresents this position of no advocacy for guilty pleas as one of "refusal to represent clients in pleading guilty," *Id* at 657, or "refusal to assist a client in entering a guilty plea," *Id* at 657-658,.

[27] *In re Stanton*, 682 A2d at 657, Appendix at 4A. There is no record of this statement respondent attributes to petitioner. Respondent denied petitioner's motion to amend the majority opinion by deleting the sentence attributing the statement to him.

The misrepresentation is the basis for the speculative prediction that, "if a client were ever to indicate a desire to plead guilty and asked for [petitioner's] assistance in doing so, the client's very indication that he wanted to waive trial would create possibly insurmountable doubt in [petitioner's] mind that the client was acting freely and intelligently."[28] On this speculation respondent concludes that petitioner "has not met his burden of proving fitness with reference to the [criterion] focusing on future misconduct."[29]

Respondent's majority opinion concluded with a comment on DC Court of Appeals rulemaking:

> We cannot have confidence on this record

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[28] *In re Stanton*, 682 A2d at 657, Appendix at 4A.

[29] *In re Stanton*, 682 A2d at 658, Appendix at 6A. The "future misconduct" would be "[petitioner's] refusal to assist a client in entering a guilty plea," *Id* at 657-658, Appendix at 4A. Respondent "gauge[s] the compatibility between his philosophical beliefs and his obligations to advise and carry out the wishes of individual clients who may . . . want to plead guilty," *Ibid*, under respondent's rule of advocacy for guilty pleas in concluding that petitioner "has not met his burden" of proving fitness for reinstatement.

> that such rules will not conflict with what [petitioner] perceives as a higher duty or create harm that his conscience cannot condone.[30]

Petitioner moved for rehearing and, when respondent denied the motion to amend the majority opinion, for disqualification of DC Court of Appeals Judges Farrell and Ruiz, authors of the majority opinion, for dishonesty indicating disqualifying bias as well as DC Court of Appeals Judge Ferren for his misrepresentation of the original disciplinary proceedings, where "there was no clear and convincing evidence that [petitioner] failed to obtain discovery or that he failed to keep his client informed"[31] but Ferren misrepresented that petitioner was suspended for "failure to obtain discovery, otherwise investigate, and keep the client informed of the progress of

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[30] *In re Stanton*, 682 A2d at 658, Appendix at 6A.

[31] *In re Stanton*, 470 A2d at 289.

the case."[32]

Farrell, Ruiz, and Ferren ignored, disregarded, and never ruled on the motion to disqualify them, and respondent denied rehearing on the reinstatement petition. Petitioner then filed the present petition for review.

ARGUMENT

To deny petitioner reinstatement to the practice of DC law, respondent DC Court of Appeals defers, ignores, disregards, and never rules on constitutional claims and distorts and misrepresents findings of fact and procedural history. Respondent resorts to such tactics because the improper rulemaking, when challenged, cannot be maintained and justified by constitutional means.

Under a veneer of sarcasm, respondent's comment

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[32]*Matter of Rosen*, 470 A2d 292, 301 (DC 1983). Ferren denied previous disqualification motions without disputing the fact of his misrepresentation of the findings against petitioner.

on its own rulemaking recognizes the truth that the rule of advocacy for guilty pleas conflicts with constitutional duties and causes harm. Petitioner has found a way to comply with respondent's rule without causing unconstitutional harm, but petitioner's pledge to comply is "insufficient" for respondent because his philosophical beliefs have not changed with his position as he has endeavored to comply in good conscience.

Respondent DC Court of Appeals will not tolerate petitioner's beliefs because respondent wants more advocacy for guilty pleas than petitioner is willing to pledge. Respondent wants DC Bar attorneys to pursue guilty pleas aggressively. Respondent wants "a client's statement that 'that sounds good. I want to accept that deal,'"[33] to "trigger [petitioner's] assistance in effecting a

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[33] *In re Stanton*, 682 A2d at 657, Appendix at 3A.

guilty plea"[34] by advocacy. Respondent wants petitioner to be a true believer in advocacy for guilty pleas and "to draw workable distinctions between his philosophical beliefs and his ethical obligations to his clients"[35] under respondent's rule before his reinstatement to practice.

Petitioner believes advocacy is for trial or defense and that counsel for the accused represent and assist them properly as negotiators and advisors in plea bargaining; further, he believes that as advocates for guilty pleas counsel coerce the accused and corrupt the voluntariness and validity of guilty pleas.

Petitioner's beliefs are proper. Voluntariness is the "long-standing test for determining the validity of a guilty

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[34] *In re Stanton*, 682 A2d at 657, Appendix at 3A. The client who reconsiders or has second thoughts in the meantime then must contradict counsel before the judge to prevent an involuntary plea.

[35] *In re Stanton*, 682 A2d 655 at 658, Appendix at 5A. Petitioner cannot in good conscience "draw workable distinctions" between his beliefs and his practice without changing his beliefs.

plea,"[36] and no defendant, properly advised by counsel, has undue difficulty in speaking up spontaneously "to announce his decision to plead guilty in open court by saying, 'Judge, I want to plead guilty' at the inception of the proceedings," thus demonstrating voluntariness and validating the guilty plea in the best way.

Respondent will not permit this constitutional practice despite the DC Bar Rule of Professional Conduct 1.2(c) provision that "a lawyer may limit the objectives of the representation if the client consents after consultation" and despite the fact that the practice ensures "that the decision whether to enter a plea of guilty or *nolo contendere* is ultimately made by the defendant."[37]

Respondent's rule of belief in advocacy for guilty

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[36] *Hill v Lockhart*, 474 US 52, 56, 106 SCt 366, 369 (1985).

[37] American Bar Association Standards for Criminal Justice, Standard 14-3.2(a). As indicated by the DC Bar Counsel's letter of admonition, respondent DC Court of Appeals believes "the decision of whether or not to go to trial" should be made by counsel, not the accused.

pleas is improper. "Regulations on entry into a profession . . . are constitutional if they have a rational connection with the applicant's fitness or capacity to practice the profession."[38] In criminal prosecutions, the essential aim of the legal profession is to guarantee "an effective advocate for each criminal defendant"[39] by "providing assistance of counsel . . . to ensure that criminal defendants receive a fair trial."[40] Respondent's rule of advocacy for guilty pleas has no rational connection with fitness or capacity "to ensure that criminal defendants receive a fair trial."

Respondent's rule of belief in advocacy for guilty

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[38] *Lowe v Securities and Exchange Commission*, 472 US 181, 228, 105 SCt 2557, 2582 (1985), citing *Schware v Board of Bar Examiners*, 353 US 232, 77 SCt 752 (1957). "When a State seeks to inquire about an individual's beliefs and associations, a heavy burden lies upon it to show that the inquiry is necessary to protect a legitimate state interest," *Baird v State Bar of Arizona*, 401 US 1, 6-7, 91 SCt 702, 706 (1971).

[39] *Wheat v United States*, 486 US 153, 159, 108 SCt 1692, 1697 (1988).

[40] *Wheat v United States*, 486 US at 159, 108 SCt at 1696-1697.

pleas cannot withstand "the most exacting scrutiny"[41] that must be applied to the rule under the First Amendment. Regulations restricting or curtailing expression are constitutional only when "necessary to serve a compelling state interest"[42] or in "situations presenting some grave and imminent danger the government has the power to prevent."[43] The compelling state interests in criminal prosecutions are fair trials and voluntary guilty pleas. Respondent's rule of advocacy for guilty pleas serves

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[41] *Turner Broadcasting System, Inc v Federal Communications Commission*, 512 US 622, 642, 114 SCt 2445, 2459 (1994). "Laws of this sort pose the inherent risk that the government seeks not to advance a legitimate regulatory goal but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion," *Id* at 641, 114 SCt at 2458.

[42] *Simon & Schuster, Inc v New York State Crime Victims Board*, 502 US 105, 118, 112 SCt 501, 509 (1991).

[43] *Simon & Schuster, Inc v New York State Crime Victims Board*, 502 US at 127, 112 SCt at 514. "As Justice Brandeis reminded us, a 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms," *United States v National Treasury Employees Union*, 513 US 454, 474, 115 SCt 1003, 1017 (1995), yet respondent DC Court of Appeals speculates about "possibly insurmountable doubt" in petitioner's mind that a client would act freely and intelligently by requesting assistance in pleading guilty.

neither interest, and, although respondent perceives defendants "who *may*, due to any number of circumstances, including an aversion to the risks of trial, want to plead guilty,"[44] trials are not dangers respondent DC Court of Appeals has the power to prevent.

Under the First Amendment, "the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind;"[45] respondent DC Court of Appeals, however, denies freedom of mind by requiring counsel to speak for the accused according to an unconstitutional construction of the DC Bar disciplinary rules and by restricting expression of contrary, constitutional views and excluding them from practice.

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[44] *In re Stanton*, 682 A2d at 658, Appendix at 6A (emphasis added).

[45] *Wallace v Jaffre*, 472 US 38, 52, 105 SCt 2479, 2487 (1985). "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence," *Turner Broadcasting System, Inc v Federal Communications Commission*, 512 US at 641, 114 SCt at 2458.

Respondent's DC Court of Appeals denies petitioner reinstatement because his beliefs "call into question" his character and because the safeguards for voluntariness he proposes in advocating for guilty pleas are "qualifications to his asserted pledge"[46] making the pledge untrustworthy in respondent's view.

Petitioner's character is questionable and his pledge untrustworthy in respondent's view because of his beliefs, but "views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law"[47] such as respondent DC Court of Appeals has conducted here in order to maintain and justify the rule of advocacy for guilty pleas.

Respondent's rulemaking is so improper, unconstitutional, and highly harmful to the rights of the accused to voluntary self-incrimination and to counsel's

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[46] *In re Stanton*, 682 A2d at 658, Appendix at 6A.

[47] *Baird v State Bar of Arizona*, 401 US at 8, 91 SCt at 707.

advocacy for assistance in defending themselves that all guilty pleas in the DC Superior Court may be presumed invalid because of respondent's rulemaking. Judgment against respondent DC Court of Appeals on the First Amendment question presented is imperative, and the question is ready for judgment.

So clear from respondent's opinions cited in this petition are the facts or merits of respondent's unconstitutional rulemaking that briefing and oral argument on the question are unnecessary. If respondent DC Court of Appeals files no brief in opposition to this petition, "a summary disposition on the merits"[48] should be ordered.

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[48]Rule 16, Rules of the Supreme Court of the United States.

CONCLUSION

Respondent's rule of advocacy for guilty pleas by counsel for the accused in criminal prosecutions should be declared unconstitutional.

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